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ATTORNEY FOR APPELLANT:

MATTHEW D. BAILEY
Greensburg, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SHANDA K. OLIVER,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 16A01-0609-CR-413

APPEAL FROM THE DECATUR SUPERIOR COURT
The Honorable W. Michael Wilke, Judge
Cause No. 16D01-0603-CM-126

March 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Shanda K. Oliver (“Oliver”) appeals her conviction for Possession of Marijuana, a Class A misdemeanor.¹ We reverse and remand.

Issue

Oliver presents a single issue for review: whether she knowingly, intelligently, and voluntarily waived her right to counsel.

Facts and Procedural History

On March 14, 2006, the State charged Oliver with Possession of Marijuana. On March 15, 2006, Oliver appeared for her initial hearing at which she received an advisement of her rights and was advised of the dangers of self-representation. Oliver advised the trial court that she was employed and had the funds to hire an attorney.² Oliver’s trial was set for August 21, 2006.

On August 21, 2006, Oliver appeared without counsel and the trial court conducted a bench trial. Oliver was found guilty as charged, and sentenced to one year of imprisonment, with all but ten days suspended to probation. She now appeals.

Discussion and Decision

On the day of trial, the following exchange took place:

Court: Miss Oliver, this matter is scheduled for a trial today. Uh, you were in court in March?

¹ Ind. Code § 35-48-4-11.

² The State misstates the record by claiming that Oliver “informed the trial court that she ... intended to hire an attorney.” State’s Brief at 5. Although the record supports an inference of that intent, Oliver did not state as much.

Oliver: Yes, sir.

Court: You were told at that time when the trial was to be held. Of course, that's today. You were going to hire counsel within thirty days. And since March I've heard nothing from you at all one way or the other. And, uh, the prosecutor is here and ready to proceed. You didn't ask for this matter to be postponed. You didn't ask to, uh, more time to hire an attorney. You didn't ask for a court appointed attorney. And that's five months ago.

Oliver: I had an attorney. I don't know where he's at. I did have one. I did not realize –

Court: Ma'am, if you had an attorney, he didn't enter, he didn't indicate to the court that he was representing you.

Oliver: I don't know about all that legal stuff, I'm sorry.

Court: Huh?

Oliver: I do not know about all that.

Court: If you hired an attorney, that attorney, he or she would have filed written documents in court indicating that that person was representing you.

Oliver: I talked to an attorney through a friend. One of the guys that I got arrested with on this case. It was going to be through his attorney. But obviously, it didn't work. I don't know what happened with that.

Court: Well, ma'am, it's your responsibility to hire your own attorney. It's not your friend's or anyone else's.

Oliver: Right. I realize that.

Court: Well, it's been five months. We've heard absolutely nothing from you. The State is ready to proceed so that's what we're going to do.

Oliver: Okay.

Court: We're going to have a trial.

Oliver: Okay.

(Tr. 2-4.) Oliver contends that her conduct did not amount to a waiver of her right to counsel. More specifically, she asserts that she did not seek to proceed pro se and she did not engage in obdurate behavior having any adverse consequence to the court proceedings.

The Sixth Amendment right to counsel protects a defendant's right to a fair trial. Poynter v. State, 749 N.E.2d 1122, 1125 (Ind. 2001). ““Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”” Id. at 1125-26 (quoting United States v. Cronin, 466 U.S. 648, 654 (1984)).

When a defendant asserts his or her right to self-representation, the court should inform the defendant of the dangers and disadvantages of self-representation. Id. at 1126 (citing Faretta v. California, 422 U.S. 806 (1975)). There is no precise language required in the advisement; however, the trial court must come to a considered determination that the defendant is making a voluntary, knowing, and intelligent waiver. Id. The determination must be made with the “awareness that the law indulges every reasonable presumption against a waiver of this fundamental right.” Id. We review de novo a trial court's finding that the defendant waived the right to counsel. Balfour v. State, 779 N.E.2d 1211, 1216 (Ind. Ct. App. 2002) (citing U.S. v. Hoskins, 243 F.3d 407, 410-11 (7th Cir. 2001)).

Here, Oliver did not specifically assert her right to proceed pro se, but rather appeared on the day of trial without counsel. A verbal waiver of a defendant's right to counsel is not always necessary, and trial courts faced with the issue of waiver have at times considered conduct that “constitute[d] a determined effort to manipulate and obstruct the trial process.”

Poynter, 749 N.E.2d at 1127 (citing Houston v. State, 553 N.E.2d 117 (Ind. 1990) and Fitzgerald v. State, 254 Ind. 39, 257 N.E.2d 305 (Ind. 1970)). Where the defendant has had sufficient opportunity to retain the assistance of counsel, a defendant's actions having the effect of depriving himself of counsel can establish a knowing and intentional choice. Id. at 1126. For example, the defendant waived counsel by his conduct when four separate court-appointed lawyers were fired by the defendant or requested to withdraw. See United States v. Irorere, 228 F.3d 816, 828 (7th Cir. 2000). Dismissal of a third attorney despite a specific warning that successive counsel will not be appointed has also been considered waiver by conduct. See United States v. Kneeland, 148 F.3d 6, 11 (1st Cir. 1998).

In Poynter, our Supreme Court applied a four-factor test to a claim of waiver of counsel by conduct. The factors are: “(1) the extent of the court’s inquiry into the defendant’s decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant’s decision to proceed pro se.” 749 N.E.2d at 1127-28. The fourth factor involves consideration of “whether the defendant’s decision appears tactical or strategic in nature or seems manipulative and intending delay, inferring knowledge of the system and understanding of the risks and complexities of trial from more deliberative conduct.” Id. at 1128, n.6.

At the initial hearing, Oliver was part of a group given an advisement of dangers and disadvantages of self-representation. When Oliver indicated that she was employed and had funds to hire an attorney, the proceedings were adjourned. Apparently, there was an implicit

understanding that Oliver would actually procure an attorney.

Five months later, Oliver appeared at trial without an attorney. However, the record does not demonstrate that Oliver was attempting to manipulate or delay the proceedings. When the trial court inquired into Oliver's reasons for appearing without counsel, she expressed her belief that she had actually obtained counsel. Confronted with the fact that no counsel had entered an appearance on her behalf, Oliver indicated that she had a conversation with an attorney "through a friend." (Tr. 3.) In hindsight, Oliver admitted that this was an inadequate effort to obtain an attorney. However, this was Oliver's first criminal trial and there are no indications of record that she was otherwise experienced with criminal trials.

At no time did Oliver request to proceed pro se. Contrary to the trial court's observation on the day of trial, Oliver had not actually advised the trial court that she would be obtaining an attorney within thirty days of the initial hearing. It is not clear that she understood that her failure to do so would result in her enforced self-representation. Accordingly, Oliver's conviction is reversed and remanded for retrial.

Reversed and remanded.

VAIDIK, J., and BARNES, J., concur.